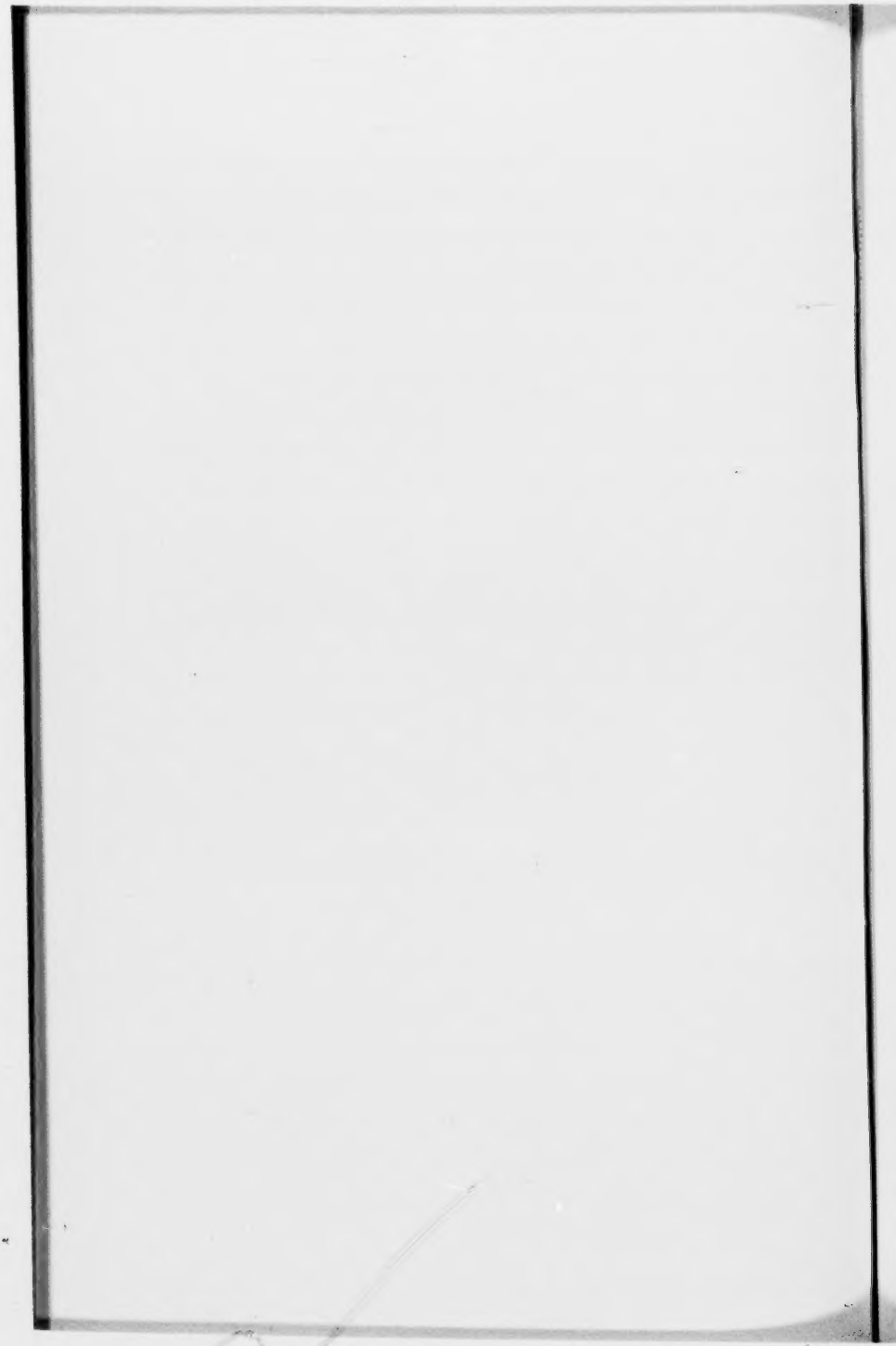

Supreme Court of the United States

October Term, 1941

No.

LULA W. GARLAND, TRUSTEE OF GREGORY G. GARLAND, A PERSON INCOMPETENT, AND CAMILLA WELLFORD GARLAND, INDIVIDUALLY,

Petitioners,

v.

UNITED STATES OF AMERICA

Brief in Support of Petition for Writ of Certiorari

I

THE OPINIONS OF THE COURTS BELOW

The opinion of the United States Circuit Court of Appeals for the Fourth Circuit is dated July 21, 1941, and is reported in 122 F. (2) 118. It may be found at pages 24 to 32 of the printed record. The opinion of the District Court of the United States for the Eastern District of Virginia has not been reported but may be found at pages 14 to 20 of the printed record.

II

JURISDICTION

1. Jurisdiction of this Court is founded on Section 19 of the World War Veterans Act, 1924, as amended (Section 445, title 38, United States Code), and on Section 240 (a) of the Judicial Code, as amended (Section 347 (a), title 28, United States Code).

2. The date of the judgment to be reviewed is July 21, 1941 (R. 32).

3. The statutes cited above confer on this Court jurisdiction to issue writs of certiorari in war risk insurance cases.

III

STATEMENT OF THE CASE

A statement of the case has been given under the heading "A" in the petition, and for the sake of brevity will not be repeated here.

IV

SPECIFICATION OF ERRORS

1. The Circuit Court erred in holding that the surrender of his United States Government (converted) insurance policy for its cash value prevented the veteran from later bringing suit on the policy and from recovering benefits thereunder upon proof that at the time of the surrender he was already totally and permanently disabled.

2. The Circuit Court erred in finding and holding that mutual mistake on the part of the Government and the insured as to the existence of total permanent disability at the time the United States Government (converted) insurance policy was surrendered for its cash value did not constitute proper ground for rescinding the surrender agreement and directing reinstatement of the policy and payment of disability benefits thereunder.

3. The Circuit Court erred in holding that mutual mistake as to the existence of total permanent disability at the time the insurance policy was surrendered did not go to the substance of the surrender agreement.

4. The Circuit Court erred in holding that the existence of total permanent disability at the time the insurance policy was surrendered, which disability was not then known to the insured or the Government but was later found by a jury to have existed, was a matter of opinion or conjecture only and not such a *fact* that mutual mistake with respect thereto furnished proper ground for rescission of the surrender agreement.

5. The Circuit Court erred in giving too much weight to the practical results of its decision, particularly with respect to the possible difficulty that might be caused the Veterans' Administration in computing reserves and dividends and in obtaining binding cash surrender agreements, and in so doing failed to apply equitable principles to the issue involved and to give the veteran the benefit of the liberal construction of the contract and the applicable statutes and the sympathetic consideration of his claim to which he was entitled.

V

ARGUMENT

Summary of the Argument

Point A. The decision below presents two important questions of federal law which have not been but should be decided by the Supreme Court.

Point B. The decision below is in principle directly in conflict with the decisions of other Circuit Courts in which the effect of mutual mistake as to the existence of total permanent disability on contracts with respect to war risk term insurance is adjudicated.

Point C. The decision below fails to give the insured veteran the benefit of a liberal construction of the insurance contract and the applicable statutes.

POINT A

The Decision Below Presents Two Important Questions of Federal Law Which Have Not Been but Should be Decided by the Supreme Court.

It should be noted that the Circuit Court restates the well-established holding that upon the occurrence of total permanent disability during the life of the policy the veteran immediately acquires a matured claim for disability benefits, even though proof of such disability be delayed until a later time. See *Boyett* v. *United States,* 86 F. (2d) 66, 68 (C. C. A. 5th), and *United States* v. *Towery,* 306 U. S. 324,

83 L. Ed. 678, 59 S. Ct. 522, petition for rehearing denied, 306 U. S. 668, 83 L. Ed. 1063, 59 S. Ct. 640. In the latter case this Court, speaking through Mr. Justice Roberts, said at page 331:

> "We think then that, reasonably construed, the Section (Section 19 of the World War Veterans Act, as amended, 38 U. S. C. A., Sec. 445) provides that there shall be but one right—that is, the right to benefit payments, and but one critical contingency which conditions that right, namely, the occurrence of permanent total disability or death while the policy remains in force."

It follows, therefore, that upon the occurrence of total permanent disability while the policy is in force, just as upon the death of the insured, the executory insurance contract ceases to be "insurance," and is changed into a matured claim for disability benefits. The important questions of federal law which have not been decided by this Court are (1) whether or not the cancellation and surrender of the policy for its cash value, after total permanent disability has matured it into the status of a claim, precludes recovery on the policy, and (2) if such surrender would otherwise preclude recovery, whether such surrender may be set aside and disability payments directed on jury findings that the insured surrendered his insurance, and the Government accepted such surrender, under the mistaken belief that no such disability then existed.

The position taken by the Government and sustained by the Circuit Court of Appeals is that the veteran, in executing the application for the cash surrender value of his

policy, subjected himself to the terms and conditions of the policy and the surrender agreement; that this surrender agreement, under which the veteran surrendered his policy "with all claims thereunder," assumed the possibility that a doubtful claim might later prove valid and enforceable; that the nature and purpose of the surrender agreement and the manifested intention of the parties in executing it precluded its cancellation on the ground of mutual mistake as to the existence of disability at the time it was executed; and that mistake as to the existence of total permanent disability did not go to the essence of the cash surrender agreement, and was not a mistake of fact but a mistake in prophecy or opinion only.

The position taken by the veteran is that total permanent disability existing at the time the insurance contract was surrendered had already matured the policy into a claim for benefits, which claim could only be satisfied by payment, by release supported by adequate consideration, or by an accord and satisfaction; that the surrender of the policy for the veteran's accumulated reserve, in which reserve the Government had no beneficial interest, did not release the larger disability claim which had become vested upon the occurrence of disability during the life of the policy; that if the surrender should be held otherwise effective, it could be set aside upon a showing of mutual mistake as to any matter material to the transaction; that the mistake as to the existence of total permanent disability and as to the resulting rights of the veteran and liabilities of the Government was material and went to the very substance of the surrender agreement; that even if the existence of disability at the time of surrender be considered collateral to

the agreement made, it was a collateral matter which had so changed the nature and character of the subject of the agreement that a court of equity would grant relief; and that under the language of the policy itself the presence or absence of total permanent disability must always be a fact even though a finding thereof awaits due proof at a later time.

These conflicting views as to the effect of surrender of a converted policy on a claim based on disability existing prior to the surrender have never been reconciled by any decision of the Supreme Court.

The First Question

The first question presented here is whether the surrender of a converted insurance policy for its cash value prevents an insured veteran from recovering benefits thereunder upon proof of total and permanent disability existing at the time of the surrender. This exact question has never been decided by the Supreme Court, but the case of *United States* v. *Arzner,* 287 U. S. 470, 53 S. Ct. 238, 77 L. Ed. 436, laid down certain principles which, if applied to the facts of the case at bar, would seem to give the insured the right of recovery. However, the Government has failed to apply these principles to cases like the instant one, and there is need for a clear and authoritative statement of the law for the guidance of the Veterans' Administration and the trial courts.

In the Arzner case the veteran converted his term insurance into an ordinary life policy in 1920, and in 1921 surrendered the converted insurance for its cash value. In 1929

he instituted suit on the original term policy, alleging total permanent disability from 1918, and in 1931 obtained a judgment which was affirmed the following year by the Circuit Court of Appeals for the Ninth Circuit. At the time of the trial Section 307 of the World War Veterans Act, 1924, as amended July 3, 1930, (38 U. S. C. A., Sec 518), was in effect, the pertinent provisions being as follows:

> "All contracts or policies of insurance heretofore or hereafter issued, reinstated, or converted shall be incontestable * * *: *Provided,* That the insured under such contract or policy may, without prejudicing his rights, elect to make claim to the bureau or to bring suit under section 19 of this Act on any prior contract or policy, and if found entitled thereto shall, upon surrender of any subsequent contract or policy, be entitled to payments under the prior contract or policy: *Provided further,* That this section shall be deemed to be effective as of April 6, 1917, and applicable from that date to all contracts or policies of insurance."

It should be noted that Arzner had already surrendered his converted insurance for cash, and for this reason was not at the time claim was made "the insured under such contract or policy" as provided in the Act; and furthermore, that if found entitled under the prior term policy, he could not then meet the requirement of delivering up the converted policy which had already been cancelled and terminated. The Supreme Court held, however, in affirming the judgment below, that notwithstanding his surrender of the converted policy for its cash value, the veteran might still elect under the Act to claim on the term policy, and, if found

entitled thereto by reason of disability while it was in force, obtain benefits. The Court stated that the failure to deliver up the converted policy worked no material disadvantage to the Government; that the veteran "became entitled in September, 1918, during the life of his original policy, to the benefits therein provided"; that if the converted policy had been allowed to lapse instead of being surrendered the veteran could have recovered; and that the Government was in no worse position than it would have been in the event of a lapse instead of a surrender.

In substance the Supreme Court held that upon proof of total permanent disability while the term policy was in force the insured might elect to take under the original contract (by reason of the statute) regardless of the fact that he had already surrendered his converted policy for its cash value. While the decision does not expressly hold that he could also recover on the converted policy, the inference that he could do so is very strong, for proof of total permanent disability under the original term policy would include proof of such disability under the later contract which had been surrendered, and the right to "elect" to proceed under the earlier and more valuable contract would seem to imply a right to recover under the later one. It is elementary that the greater includes the less, and if the insured has the right to prove total permanent disability under the term contract and to elect to receive benefits under that contract, despite the fact he has surrendered his insurance under the subsequent converted contract, it follows that he would have an equitable right under the decision to prove the existence of such disability while the converted policy was in force and to elect to receive benefits under that policy. While the

wording of the statute indicates that only a presently insured veteran who holds a reinstated or converted policy may elect to make claim and receive payments under a prior policy, yet the Court construed the language as being broad enough to extend the privilege to a veteran whose insurance has been converted and then surrendered for cash, a clear indication that it is the occurrence of disability while the insurance is in force which creates the beneficial right, and that this right is not lost by the surrender of the policy for a fraction of its actual value after the right has once accrued.

In the Arzner case total permanent disability occurred while a term policy was in force and before its conversion into ordinary life insurance, while in the Garland case such disability occurred after the term policy had been converted into a twenty pay life contract. In each case the converted policy with all claims thereunder was surrendered for its cash value and the policy itself delivered up for cancellation. If the surrender of Arzner's converted policy did not prevent his recovery from 1918, it seems that the surrender of Garland's converted policy should not prevent his recovery from 1933, both being insured when disability occurred. The right to recover disability benefits despite the surrender of the policy for its cash value is not conferred by the Act of July 3, 1930, but depends upon equitable principles applied by the Court. The right of election given by the Act to claim under the prior policy presupposes the existence of a similar right under the later one. If surrender for cash does not cut off the right to assert the earlier claim, it would seem to be equally ineffective as to the later one. Furthermore, if Garland's converted policy had lapsed instead of being surrendered the Government would not now question his right

to benefits. The only bar to recovery is the surrender agreement, and, just as in the Arzner case, the Government has suffered no disadvantage on account of such surrender, the cash value and the amount of the outstanding loan being credited in the settlement and the payments proportionately reduced. If the Court in the Arzner case could cut through the technical defenses interposed and grant the relief which accords with the nature and purpose of the war risk insurance plan, there would seem to be no reason why similar action is not appropriate here.

The Second Question

The second question presented here is whether, assuming that the surrender of the policy otherwise estopped the veteran from further recovery thereon, such surrender should have been rescinded upon proof that it was made under mutual mistake as to the existence of disability.

The Circuit Court conceded that a surrender agreement may be rescinded for mistake of a material fact, but held that the mistake as to the existence of total permanent disability did not go to the essence of the surrender agreement and was not a mistake of fact but merely a mistake in prophecy or opinion.

The parties to the surrender agreement executed it under the assumption that they were dealing with an executory contract of insurance—only such contracts are surrendered for their cash value. As a matter of fact the existence of disability at the time of surrender had matured this contract into a liquidated claim for benefits. The mistake as to the existence of total permanent disability and as to the result-

ing change in the insurance contract went to the very nature and character of the instrument which was being surrendered. What the parties assumed to be an insurance contract requiring premium payments, protecting against future contingencies, and having a cash surrender value of $126.80, was in reality a liquidated claim against the Government for monthly benefit payments aggregating approximately $8,000.00, with future premiums waived. To say that equity may not relieve against such mistake because the mistake does not go to the essence of the surrender agreement is to shut one's eyes to reality and to be influenced by form rather than by substance.

Conceding, for the sake of argument, that the presence or absence of disability at the time of surrender was a matter collateral to the surrender agreement, in the sense that it did not enter into the consideration and negotiation of the parties in the execution of the agreement, yet its absence furnished the basis on which the contract was made, and its presence, if known, would have effectively prevented the execution of any agreement of surrender. The parties erroneously assumed a certain state of facts to exist and bargained on the faith of that assumption, and the assumed facts so materially affected their rights and obligations that it is unthinkable either would have entered into the agreement with knowledge of the true situation.

The applicable rule is stated by Professor Williston in his work on Contracts (Revised Edition), Section 1544 at page 4333:

> "It is often said that mistake, in order to justify rescission, must relate to the intrinsic nature of the bar-

gain; and, in distinction from this, a mistake in regard to a collateral matter or in regard to some matter which formed merely the inducement to a contract is said to be without effect. It seems too broad to say, as many courts have done, that the contract is voidable whenever the matter to which the mutual mistake relates is so fundamental that the parties would not have entered into the transaction had they known the true situation. It seems a better mode of statement to say that a mistake vitally affecting a fact or facts on the basis of which the parties contracted renders their contract voidable by an injured party. That is, where the parties assumed a certain state of facts to exist, and contracted on the faith of that assumption, they should be relieved from their bargain if the assumption is erroneous, and the materiality of the state of facts is weighty evidence of the assumption. This is a sound principle of justice, and should be applied without any further question as to whether the mistake is intrinsic or extrinsic, or whether it affects identity or quality. Though there may be no mistake as to the identity of a thing to which a contract relates, the basis of the bargain may so clearly be that the thing in question possessed certain qualities or would fulfill a certain purpose as to make it inequitable to enforce the bargain if this assumption is not true."

See also Restatement of the Law of Contracts, Vol. II, Section 502 at page 962:

"Where both parties assume the existence of a certain state of facts as the basis on which they enter into a transaction, the transaction can be voided by a party who is harmed, if the assumption is erroneous."

Was the mistake here a mistake of fact? That Garland was disabled at the time he surrendered his policy is now settled. The jury verdict and the judgment of the trial court determined that and it is no longer challenged by the Government. If that condition is now an admitted fact it must have been a fact then even though not known to the parties. In all cases of rescission for mistake the true facts must be found before the doctrine can be applied, but when once found they relate back to the critical point of time and are treated as facts for all purposes.

In War Risk insurance the parties to the contract expressly agree that death or the condition of total permanent disability shall be the test of liability—the two events which can mature the policy into a claim. The jury has determined that in the instant case the latter event came into existence while the policy was in force, and mistake as to its existence must of necessity have been a mistake of fact.

Your petitioners believe that the Circuit Court erred in holding that disability existing at the time of surrender of a United States (converted) insurance contract does not furnish ground for rescission of the surrender agreement, but irrespective of whether this holding constitutes error or not, the question is of vital importance to insured veterans and has not been determined by the Supreme Court.

POINT B

The Decision Below is in Principle Directly in Conflict With the Decisions of Other Circuit Courts in Which the Effect of Mutual Mistake as to the Existence of Total Permanent Disability on Contracts with Respect to War Risk Term Insurance is Adjudicated.

The Circuit Court held that mutual mistake as to the existence of total permanent disability at the time the converted policy was surrendered did not go to the essence of the surrender agreement, and further that the mistake involved was not a mistake of fact but a mistake in prophecy or opinion only.

This seems to be the first time a Circuit Court of Appeals has rendered a decision determining the effect of such mistake on agreements surrendering United States Government (converted) insurance. However, there are a number of decisions of the Circuit Courts holding such mistake a sufficient ground for rescinding agreements reinstating, converting, or reducing in amount war risk term policies. Of course these agreements differ from each other, and from surrender agreements, but it is difficult to see how these differences in the nature of the agreements can be so vital that mutual mistake as to the existence of disability is ground for rescission in one and not in all. If disability exists there is no executory insurance contract to reinstate, to convert, to reduce in amount or to surrender. The state of facts which the parties assume to be in existence, namely, the absence of total permanent disability, is the same in every case and the mistake in all is as to this same state of

facts. In each case the presence or absence of disability affects the nature and character of the insurance contract and fixes its status as continuing insurance or as a claim, and such contract is the subject matter of the several agreements. How then can it be said that such mistake goes to the essence of the agreement for reinstatement or conversion but is immaterial in a surrender agreement; or that such mistake is a mistake of fact where reinstatement or conversion is involved but a mistake in prophecy or opinion where the agreement is one of surrender?

It seems clear that if the presence or absence of disability is a fact material to one of these agreements it is a fact material to all, and that if decisions of the Circuit Courts sustain the rule that mistake as to the existence of disability is ground for rescinding agreements reinstating, reinstating and converting, or reducing the amount of term insurance, then the decision of the Circuit Court in the instant case must be in direct conflict with this rule.

In the case of *United States* v. *Golden*, 34 F. (2d) 367 (C. C. A. 10th), a veteran had converted his term policy into an ordinary life policy in 1926. At a later time he brought suit on the term policy, alleging disability from 1919. The Government contended that the term policy had been discharged by virtue of its surrender and the acceptance of the converted policy, and the veteran countered with a claim of mutual mistake as to the existence of disability at the time of the conversion. The court held that if the parties had believed a matured claim existed the new policy would have been neither applied for nor issued, and then summed up the whole matter at page 376 as follows:

> "A policy of insurance was issued and paid for; the risk insured against occurred while it was in force, and the plaintiff is entitled to his money. The objections urged go to form, and not to substance, and are not sound. The trial court did no more than put the parties in the position they would have been in if they had not been mistaken as to the facts; it rectified a mutual mistake in accord with settled rules of equity and does substantial justice to the parties."

In *United States* v. *Schweppe*, 38 F. (2d) 595 (C. C. A. 8th), a term policy had been reinstated and then converted into endowment insurance, and suit later brought on the term policy. The court held that although mutual mistake as to the existence of disability was not pleaded it must have been present, and said at page 598:

> "In the light of the verdict of the jury, it is apparent that the proceedings subsequent to July 1, 1919, were the result of a mutual mistake on the part of the government and the appellee. There was no insurance to be reinstated and none to be converted. It seems to us that it would work a serious injustice to hold that, where there was a mutual mistake on the part of the government and the appellee, such mistake should be permitted to operate as an estoppel as to one of the parties, and prevent him recovering for his total and permanent disability."

See also *Heineman* v. *Heineman*, 50 F. (2d) 696 (C. C. A. 6th), where the court held that if disability existed during the life of the term policy, an agreement of settlement, made with the widow of insured by stipulation and confirmed by amended pleadings, was made under a mistake of fact, and that the trial court could consider proof of such

disability in fixing the rights of the widow and the named beneficiary under the policy.

In a number of cases in the Ninth Circuit, where recovery was denied because the reinstatement and conversion was held to amount to a novation, or because untrue allegations of good health in the application for reinstatement created an estoppel, the court was careful to state that if mutual mistake as to the existence of total permanent disability had been shown different decisions might have been reached. See *United States* v. *Buzard,* 33 F. (2d) 883 (C. C. A. 9th); *United States* v. *Cross,* 33 F. (2d) 887 (C. C. A. 9th); *United States* v. *Allen,* 33 F. (2d) 888 (C. C. A. 9th). In none of the cases, either in the Ninth Circuit or elsewhere, was there any suggestion that the mistake as to disability was not material to the new agreement, or that it failed to measure up to the requirements of a mistake of fact.

Since the Act of Congress of July 3, 1930 (38 U. S. C. A., Section 518), quoted supra, permitting recovery on prior policies upon surrender of later ones, the Government has been denied the defense of estoppel by reason of reinstatement or conversion of term policies, and even in those circuits where such defense was formerly held valid, the veteran has had no need to rely upon mistake as to the existence of disability at the time his term policy was reinstated or converted in order to recover on his term policy. However, the equitable principles upon which, prior to the Act of 1930, recovery was permitted where the parties were mistaken as to the existence of total permanent disability are just as valid today as they were before 1930, and the Circuit Court of Appeals for the Fourth Circuit, in failing to apply

these principles in the case at bar, has created a real and embarrassing conflict of opinion and authority.

POINT C

The Decision Below Fails to Give the Insured the Benefit of a Liberal Construction of the Insurance Contract and the Applicable Statutes.

A consideration of the development of war risk insurance legislation, and the application of the statutes to the varied fact situations that have arisen, indicates that the principle of liberality to the veteran and sympathetic consideration of his claim has always been present to turn the scales in his favor in case of any reasonable doubt. See *White* v. *United States,* 270 U. S. 175, 180, 70 L. Ed. 530, 46 S. Ct. 274; *United States* v. *Cox,* 24 F. (2d) 944 (C. C. A. 5th); *United States* v. *Schweppe,* 38 F. (2d) 595 (C. C. A. 8th); *United States* v. *Hartley,* 99 F. (2d) 923 (C. C. A. 9th); *United States* v. *Arzner, supra.* Over-refined distinctions and rulings have not been permitted to outweigh simple justice and fair dealing to those who have served their country in time of need, and in the application of the statutes the courts have usually been diligent in carrying out the legislative intent and purpose to provide veterans with protection against death or disability occurring while the insurance contract was in force.

In the case at bar, the Circuit Court not only failed to give the insured veteran the benefit of a sympathetic consideration of his claim, but stated frankly that in reaching its conclusion it had been mindful of the difficulty which might be caused the Veterans' Administration in computing reserves and dividends and in obtaining binding cash surrender agreements if a different conclusion should be

reached. To permit the convenience of the Veterans' Administration to outweigh the rights of the veteran is to apply a harsh and technical rule of law to a situation which demands equitable relief.

That the rule of liberal construction of War Risk insurance contracts and the statutes applicable thereto, and of sympathetic consideration of veterans' claims, should be followed and a proper precedent established in this first case arising under the World War Veterans Act in which is involved both the right to recover on a converted policy which was surrendered for cash while the insured was already disabled, and the effect of mutual mistake in the cash surrender agreement, is a matter of the greatest importance to all veterans who rely upon their Government insurance for protection against total permanent disability.

CONCLUSION

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers in order that an authoritative adjudication of the rights of veterans in insurance contracts which are surrendered for their cash value after disability has occurred, and of the effect on cash surrender agreements of mutual mistake as to the existence of disability at the time of surrender, may be had, and that to such an end a writ of certiorari should be granted and the decision of the Circuit Court reviewed and finally reversed.

Respectfully submitted,

ROBERT C. DUVAL, JR.,
JOHN B. DUVAL,
Counsel for Petitioners.

(24)

FILED
OCT 22 1941
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

October Term, 1941

No. 698

LULA W. GARLAND, TRUSTEE OF GREGORY G. GARLAND, A PERSON INCOMPETENT, AND CAMILLA WELLFORD GARLAND, INDIVIDUALLY,

Petitioners,

v.

UNITED STATES OF AMERICA

Supplement to Brief in Support of Petition for a Writ of Certiorari

ROBERT C. DUVAL, JR.
JOHN B. DUVAL
Counsel for Petitioners.

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Supplement to Brief in Support of Petition for a Writ of Certiorari

Petitioners respectfully represent that after their petition for a writ of certiorari and supporting brief had been prepared they learned that on October 6, 1933, the Administrator of Veterans' Affairs promulgated for observance by all officers and employees of the Veterans' Administration in non-litigated cases an administrative order under the terms of which veterans' claims on converted policies which have been surrendered for cash after the occurrence of total permanent disability must be recognized as valid and paid.

Petitioners submit that this order, establishing a rule of administrative decision and practice which has now been

in effect for eight years, and directing payment of claims where the proof of disability is acceptable to the Administrator and litigation to prove such disability unnecessary, is of sufficient importance to be considered by this Court in determining if a Circuit Court decision directly in conflict with such practice should be reviewed. That the rights of a veteran whose disability is found by a jury or a trial court are co-extensive with those of another whose disability is found by the Administrator, is too obvious for argument. That these rights should be determined and a uniform rule of decision and practice applicable alike to litigated and non-litigated cases should be established for the guidance of the Veterans' Administration and the Trial Courts is of vital importance to all insured veterans.

The rule that the construction given a statute for a long period of time by the department of the government charged with the administration and practical application of that statute is entitled to great weight is too well established to need support by citation of authorities.

A copy of Administrator's Decision No. 187, and a copy of a letter from the Director of the Bureau of War Risk Litigation stating that he is unaware of any modification of this decision by the Veterans' Administration, are attached, and it is respectfully requested that this Court give to these papers the consideration to which they may be entitled.

Respectfully submitted,

ROBERT C. DUVAL, JR.,
JOHN B. DUVAL,
Counsel for Petitioners.

ADMINISTRATOR'S DECISION
VETERANS' ADMINISTRATION, NO. 187

October 6, 1933.

Subject: THE EFFECT OF A SURRENDER FOR ITS CASH VALUE OF A CONVERTED INSURANCE POLICY WHERE PERMANENT AND TOTAL DISABILITY IS FOUND TO EXIST PRIOR TO THE DATE OF THE SURRENDER.

QUESTION PRESENTED: What effect is to be given to the decision of the Supreme Court of the United States, *United States* v. *Clarence P. Arzner* (Advance Opinions 1932-1933, 77 L. Ed. 372) in relation to existing precedents upon the surrender of converted insurance for its cash value?

FACTS: In case A the veteran had a converted policy for $3,000 on which he secured a loan and later surrendered the policy for its remaining cash value. After his death suit was instituted on the policy by the designated beneficiary and the court found that the veteran was permanently and totally disabled while the converted policy was in force and entered a judgment allowing credit for the amounts paid by way of loan and cash value. In case B the veteran reinstated $10,000 term insurance and converted it on April 1, 1925, paying premiums on the converted insurance to include June, 1927. No premiums were paid after June, 1927, but the policy remained in force under extended insurance until December 7, 1928, when the insured requested the cash surrender value and in accordance with his request was paid the same and the converted policy cancelled. Subsequently

this veteran filed a claim for permanent and total disability, alleging that he became so disabled November 1, 1928, when the converted policy was in force under its extended insurance provisions. The veteran was found to be permanently and totally disabled from August 20, 1928, and the date on which due proof was received by the Administration was February 27, 1929, subsequent to the surrender.

COMMENT: The precedents of the Administration heretofore have been that payment on a surrendered policy of converted insurance might be made where it was shown that the insured was permanently and totally disabled prior to the surrender for the cash surrender value, by reason of a statutory disability or by reason of a disability which under the terms of the contract itself constitutes a permanent and total degree, or where it is found by the Veterans' Administration that proof of permanent and total disability was received before the surrender of the converted policy for its cash value. In decisions of the Comptroller General of January 30, 1923, and March 4, 1924, (2 Comp. Gen. 465; 3 Comp. Gen. 382), it was held that a retroactive rating of permanent and total disability based on evidence on file prior to the surrender of the policy for cash value matures the policy as of the effective date of the award and entitles the insured to the full benefits of the matured policy subject to reduction of any amount already paid as a cash surrender value, but that a retroactive rating of permanent and total disability rendered after the policy had been surrendered for its cash value is ineffective to mature the policy prior to its surrender or to void the surrender, if the evidence upon

which the disability rating was made was not received at the time the policy was surrendered. The question of statutory disabilities and of contract disabilities was not directly involved in the Comptroller General's decisions. Subsequent to these decisions the World War Veterans' Act was amended July 3, 1930, and with reference to section 307 as thus amended the United States Supreme Court rendered an opinion in the case of the *United States of America* v. *Clarence P. Arzner*, (Advanced Opinions 1932-1933, 77 L. Ed. 372), and in the light of this far reaching decision it is necessary to modify the existing precedents based upon the cited decisions of the Comptroller General. In the Arzner case the insured was protected by $10,000 term insurance with premiums paid through January, 1919. Effective March 1, 1920, the policy was reinstated and converted with premiums paid through February, 1921. The insured then surrendered $5,000 and received the cash surrender value, $45.00, and in December, 1921, surrendered the remaining $5,000 and received its cash surrender value, $18.30.

On March 5, 1929, suit was instituted alleging permanent and total disability commencing in 1918, and seeking recovery under the original term contract of $10,000. It was held that one whose total and permanent disability began while the War Risk Insurance contract was in force was entitled to recover under section 307 of the World War Veterans' Act, 1924, as amended July 3, 1930, and that the insured might elect to claim under the prior policy and if found entitled thereto should, upon surrender of the subsequent policy, be entitled to payments under the prior contract, notwithstanding the fact that he had already sur-

rendered for its cash value the policy into which he had converted his term insurance.

The Supreme Court of the United States, speaking through Mr. Justice McReynolds, said:

> "Undoubtedly, respondent became entitled in September, 1918, during the life of his original policy, to the benefits therein provided. And we think Congress by the Act of 1930, intended to permit him to assert the right which then accrued. To deprive him of this simply because he could not actually surrender a writing already delivered to the United States would defeat the generous purpose behind the enactment.
>
> "True it is, respondent agreed to cancellation of his converted policy and accepted the surrender value—a portion of the money paid by him for premiums thereon. But this action worked no material disadvantage to the Government. Indeed the veteran made payments when in fact entitled to receive monthly benefits for total disability. If the converted policy had been allowed finally to lapse because of nonpayment of premiums, the agreement between the parties would have been fully complied with. Nevertheless the proper admission is that under such circumstances there could have been a recovery on the original policy, upon actual surrender of the expired policy. The Government now has possession of the cancelled converted policy and is in no worse position than it would be in the supposed circumstances."

Elsewhere in the opinion it is made plain that the question was carried to the Supreme Court of the United States because of divergent views which had arisen in the Circuit

Courts of Appeal and it was because of this conflict that the Supreme Court of the United States granted a writ of certiorari. It is, therefore, evident that the Arzner opinion was intended to dispose of more than merely the Arzner case, namely, to reconcile once and for all the conflicting views of the Circuit Courts and to promulgate a general rule for application to the widest possible extent within reason.

In substance the Supreme Court of the United States while recognizing that the insured had surrendered his converted insurance for its then cash surrender value held the plaintiff might nevertheless be entitled to prove permanent and total disability while the original term insurance was in force, and further that the insured upon proof of such permanent and total disability while the original contract was effective might at the same time elect to take under the original contract (by reason of section 307) without being debarred from such action by the contention that the converted insurance had already been surrendered for its cash value. The effect of this decision is to say that where an insured can sustain the burden of proving permanent and total disability when term insurance was in force, he may cut through all the transactions in connection with the conversion, including, of course, its surrender for its cash value which under the necessities of the case is but a fraction of the face of the policy, and may if he desires stand upon the original policy.

If, in the Arzner case the plaintiff was permitted to assume the burden of showing permanent and total disability as of some time when the original term contract was effec-

tive, it is clear beyond dispute that the burden upon the plaintiffs in the two pending cases becomes far less, as they seek only to show permanent and total disability while the converted insurance was in force and prior to its surrender for its cash value. In the Arzner case, therefore, the Government was precluded from maintaining that a surrender for the cash value would prevent the claimant from proving permanent and total disability when the term contract was in force. It is admitted that in the Arzner case the facts on their face were different from the facts of these present claims but the conclusion reached by the Supreme Court of the United States would apply a fortiori to the question now under consideration, because here there is involved only the respective contract of converted insurance and there is no question of electing to go back to the original term contracts. It is elementary that the greater includes the less and if as in the Arzner case an insured has the right to prove permanent and total disability under the term contract and to elect to receive benefits under that contract, in spite of the fact that he had surrendered a subsequent converted contract for its cash value, it would follow that where there is a lesser burden as in the present case the plaintiffs would have an equitable right under the principle of the Arzner decision to prove permanent and total disability when the converted policy was in force,—that is to say at some time prior to the acceptance of the cash surrender value, even though due proof of said permanent and total disability may not have been adduced until after the cash surrender value has been paid.

HELD: As to case A (the litigated case) there should be no appeal and said case should be settled in accordance with the terms of the judgment of the District Court already rendered; as to case B, this should be settled on the theory that even though due proof of permanent and total disability was not received until after the surrender of the converted policy said surrender for the cash value may be set aside and the claim paid on the converted policy with a due allowance for any amounts already paid in satisfaction of the cash surrender value. As to any non-litigated cases involving this question, existing precedents stand as modified so that (a) where the disability is statutory or contract a surrender for cash value may be set aside where permanent and total disability is found to exist prior to the surrender (in accord with present precedents), (b) that where the permanent and total disability is not statutory or contract but where proof thereof was received prior to the surrender for cash, the latter may be set aside (in accord with present precedents), and (c) in direct modification of prior precedents the same rule should be applied even though proof of the permanent and total disability should not have been received until after the surrender for the cash value. (Opinion of the Solicitor, Veterans' Administration, dated August 21, 1933, approved by the Administrator August 23, 1933, XC-1,343,372 and XC 1,383,011.)

The foregoing decision is hereby promulgated for observance by all officers and employees of the Veterans' Administration.

FRANK T. HINES,
Administrator of Veterans' Affairs.

JULIUS C. MARTIN
DIRECTOR

Bureau of War Risk Litigation
U. S. DEPARTMENT OF JUSTICE
WASHINGTON, D. C.

October 3, 1941

Messrs. Duval & Duval,
Attorneys and Counsellors at Law,
American National Bank Building,
Richmond, Virginia.

UNITED STATES v. LULA W. GARLAND,
Trustee of Gregory G. Garland.

Gentlemen:

A copy of Administrator's Decision No. 187 is transmitted herewith in accordance with the request in your letter of September 27, 1941.

I am unaware of any modification of this decision by the Veterans Administration.

Very truly yours,

JULIUS C. MARTIN
Director.

Encl. No. 41757

cc to—
Mr. H. L. McCoy,
Director of Insurance,
Veterans Administration,
Washington, D. C.